EMPLOYMENT TRIBUNALS

Claimant: Mr K Whelan

Respondent: GenSight Limited

Heard at: Croydon via CVP **On:** 25 September 2025 to 30 September 2025

Before: Employment Judge Wright

REPRESENTATION:

Claimant: In person
Respondent: Mr C Ludlow - counsel

JUDGMENT having been sent to the parties on and written reasons having been requested in accordance with Rule 60(4) of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

REASONS

1. The claimant presented a claim on the 15 July 2024. His period of employment was 15 July 2019 to 18 March 2024. He engaged in Acas early conciliation between 30 May 2024 to 21 June 2024, with the result that any event before the 29 February 2024 is potentially out of time.

2. At a case management hearing on the 4 April 2025 his claims were clarified as unfair dismissal, with the respondent relying upon the potentially fair reason of redundancy and of unlawful discrimination under the Equality Act 2010 (EQA). His protected characteristic was age (s.5 EQA). He defined his particular age group as aged 66 and he comparted himself with people under the age of 60. His complaint was of dismissal and detriment (s.30(2)(c) and (d) EQA). The prohibited conduct relied upon was: direct discrimination (s.13 EQA) and victimisation (s.27 EQA). The claimant had pursued a claim of

harassment (s.26 EQA). That claim was the subject of a deposit Order, the claimant had not paid the deposit and so the claim of harassment is struck out.

3. The monetary claims had also been withdrawn.

4. The Tribunal heard evidence from the claimant and Mr Paul Flowerdew (the claimant's line manager). For the respondent it heard from Mr David Munt, the founder and managing director and Mr John Wheals (Head of Professional Services at the respondent).

5. The witness statements were unsatisfactory. The claimant acknowledged he has used AI to assist him in drafting his statement. That resulted in a statement running to 103-pages. It was therefore unwieldy and prolix. As an example, the claimant listed 13 personnel by initial. He listed 61 definitions and abbreviations. There were over-60 exhibits and 73 footnotes. Rather than using AI, the claimant may well have been much better served by just setting out, in his own words, what it was he wanted to say to the Tribunal in particular, focusing upon the allegations he was pursuing.

6. Mr Munt's witness statement for the respondent ran to 70-pages and 313 paragraphs. His witness statement included irrelevant matters, such as his childhood and upbringing. The respondent was legally represented throughout. Tribunal's standard case management Order sets out the requirements of a witness statement:

> 'A witness statement is a document containing everything relevant to the issues to be determined by the Tribunal of which the witness has good knowledge and can tell the Tribunal about.'

7. Furthermore, the witness statements referred to the harassment claim, which had been struck out.

8. The availability of the witnesses was also unsatisfactory. This final hearing was listed on the 25/10/2024. After the claimant's evidence concluded on the first day, there was enough time to have heard from Mr Featherdew, however he was not available. Equally, at the end of the second day, after Mr Munt's evidence, there would have been time to hear from Mr Wheals. If witnesses are called, they are expected to be available in order that the Tribunal's time may be used as effectively as possible.

9. At the outset of the hearing, the claimant had indicated that he had prepared questions for the respondent's witnesses. Mr Munt's witness statement was dated 4 August 2025 and Mr Wheals' was dated 19 August 2025 (a 20-paragraph witness statement running to six-pages).

10. On day two, after Mr Flowerdew's evidence, the Tribunal moved onto hear the respondent's case. The claimant requested and was granted a five minute break. He started to cross-examine Mr Munt, however it was drawn to a halt after approximately 25 minutes. The reason for that was the claimant was not focusing on the issues the Tribunal had to determine. The claimant was asking questions that were relevant to him, but were irrelevant to the issues.

11. The other difficulty was that the claimant was asking questions about matters from some years ago, which had not been identified as an issue and therefore, they were not in the immediate recall of Mr Munt (and example was a reference to a slide on a screen during a meeting and whether or not the claimant pointed to the slide). It was decided to take a break until midday in order to give the claimant some time to formulate his thoughts.

12. When the hearing resumed at midday, the claimant asked if the hearing could take an early lunch, to give him more time to prepare. That was agreed. The hearing resumed at 13:00 and the claimant's questions were much more effective and focused in particular on the redundancy decision, process and he referred indirectly to some age discrimination issues. At approximately 13:15, the claimant said that was the extent of the questions he had prepared in the time he had. He requested a further adjournment until 14:00 to prepare his remaining questions.

13. Mr Ludlow helpfully and appropriately agreed to the claimant's requests. A further adjournment was granted on the basis that the claimant would have a further hour to question Mr Munt and that no further adjournments for the purpose of preparation would be granted.

14. After a further adjournment to allow the claimant to further prepare his questions, he said that he only had two further questions for Mr Munt. He put those questions to him and it was suggested to him that he put the four allegations to Mr Munt, so that they had been challenged; which the claimant did.

15. It was not acceptable that the claimant was unprepared and that he needed additional time during the hearing to prepare his questions for Mr Munt. The claimant was allowed as much time as possible. It was unsatisfactory for Mr Munt to be called to give his evidence and then for breaks needed for the claimant to prepare. The claimant was afforded as much leeway and time as was possible. He should really however, have prepared his questions well in advance of the hearing.

16. The Tribunal had an electronic bundle of 393-pages.

17. Both sides made oral submissions and provided written submissions.

18. At the start of the hearing the issues were clarified as and taken from the list of issues (page 48):

Unfair dismissal

2.1 Was the Claimant dismissed? Yes.

2.2 What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy, or in the alternative, some other substantial reason.

2.3 If the reason was redundancy, did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? The Tribunal's determination 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:

2.3.1 The Respondent adequately warned and consulted the Claimant;

2.3.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;

2.3.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment;

2.3.4 Dismissal was within the range of reasonable responses.

…

Direct age discrimination

4.1 The Claimant was 66 at the date of his dismissal and they compare their treatment with people in the age group below the age of 60.

4.2 Did the Respondent do the following things:

4.2.1 Dismiss the Claimant on 18 March 2024;

4.2.2 Not permit the Claimant to do training in connection with all new GenSight replacement projects. The Claimant says he was excluded from working on the projects on by David Munt. The Claimant says from 9 February 2022 he was not permitted to undertake the three month training programme that other members of staff attended for the react project. The Claimant says from says from sometime between 5 July 2023 and 31 October 2023 he was not permitted to undertake the GenSight 2 training programme. The Claimant says the training takes approximately three months but all participants learn at a different rate.

4.3 Was that less favourable treatment?

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

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

The Claimant says they were treated worse than Mr. Rashid.

4.4 If so, was it because of age?

4.5 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

4.5.1 The Respondent denies any discrimination and does not rely on a proportionate means of achieving a legitimate aim defence.
…

Victimisation

6.1 Did the Claimant do a protected act as follows:

6.1.1 On 17 April 2024, via his solicitor, assert that he was subjected age discrimination.

6.2 Did the Respondent believe that the Claimant had done or might do a protected act?

6.3 Did the Respondent do the following things:

6.3.1 On 2 May 2024, the Respondent, via its solicitor, indicate that there were performance issues with the Claimant and the Respondent could not trust the Claimant to deliver on projects.
…

And remedy should any claim be successful.

Law

19. S.5 EQA provides:

(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.

20. S.13 EQA provides:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

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

21. S.23 EQA provides:

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

22. S.27 EQA provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because:

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

23. S.136 EQA provides:

(1) This section applies to any proceedings relating to a contravention of this Act.

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

> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
>
> …
>
> (6) A reference to the court includes a reference to-
>
> (a) an employment tribunal;…

24. In the context of victimisation, it is hard to imagine circumstances where an 'honest and reasonable' action by an employer, could lead to a detriment to the employee (Derbyshire v St Helens Metropolitan Borough Council 2007 ICR 841 HL).

25. An 'honest and reasonable' attempt by an employer to protect its position in litigation does not automatically protect it from a charge of victimisation. British Medical Association v Chaudhary 2007 IRLR 800 CA, 'reaffirmed the essential statement of law that a person does not discriminate if he takes the impugned decision in order to protect himself in litigation'.

26. In respect of claims under the EQA, the Court of Appeal stated that: 'The bare facts of a difference in status and a difference in treatment only indicates 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 has committed an unlawful act of discrimination'. (Madarassy v Nomura International plc [2007] ICR 867)

27. If a claimant establishes a prima facie case of discrimination, then the second stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the respondent. According to the Court of Appeal, the respondent must at this stage prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground. (Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931 CA)

28. If a Tribunal is able to make positive findings on the evidence it is not necessary to apply the burden of proof provisions mechanistically. In such a case a Tribunal may proceed directly to considering the reason for the treatment. (Hewage v Grampian Health Board [2012] UKSC 37)

29. The House of Lords adopted Brightman LJ's definition of 'detriment' when he stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL)

30. In respect of the vagueness of the allegations, it is important to establish that the treatment was because of a protected characteristic it must be shown that a named individual (or a number of individuals) who subjected the claimant to a detriment was consciously or subconsciously influenced by the protected characteristic. Unless the claimant identifies the alleged discriminator(s), that

exercise cannot be conducted and the claim will fail. (Reynolds v CLFIS (UK) Ltd [2015] IRLR 562)

31. In respect of unfair dismissal s.94(1) ERA provides that an employee has the right not be unfairly dismissed.

32. S.98 ERA provides:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> > (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> >
> > (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it…
>
> > (c) is that the employee was redundant…
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is 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…

33. S. 139(1)(b) ERA 1996 provides, that a dismissal is by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the employer's business for employees to carry out work of a particular kind has ceased or diminished, either in general or at the location at which the employee was employed. S.139(6), in 'subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason'.

34. Lord Irving in Murray and Another v Foyle Meats Ltd [1999] ICR 827 (HL), 829 said:

> …the language of paragraph (b)…asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation…

35. Fairness - if the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal will then consider whether the dismissal was in fact fair under s. 98(4) ERA 1996, applying a neutral burden of proof.

36. The case of Williams v Compair Maxam Ltd [1982] IRLR 83, EAT, 162, set out five factors which may provide useful guidance on fairness in a redundancy dismissal:

> The employer will seek to give as much warning as possible of impending redundancies;
>
> The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible', including the selection criteria to be applied;
>
> The selection criteria ought to be fair and ought not to depend solely on the subjective opinion of the selector;
>
> Selection ought to be made fairly in accordance with these criteria; and
>
> The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

37. The guidelines in Compair Maxam are not principles of law but rather standards of behaviour which may inform the application of the section 98(4) reasonableness test. The overriding test is whether the actions of an employer at each stage of the redundancy process was within the band of reasonable responses.

38. Individual consultation - consultation must be meaningful and must give the employee 'fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely' (R v British Coal Corpn, ex p Price, [25]).

39. Individual consultation is 'more personally directed' and would instead consider 'such things as alternative employment' (De Bank Haycocks v ADP RPO UK Ltd [2024] ICR 432)

40. A further factor which informs the adequacy of consultation is the external financial pressure causing the relevant business downturn and applicable timescales. It is for this reason that in exceptional cases a failure to consult will not render dismissal unfair where consultation would be futile, eg, where due to the sudden loss of a major client, the business can no longer survive and will soon cease to exist. (Polkey v AE Dayton Services Ltd 1988 ICR 142 HL)

41. The then President of the EAT, reviewed all the authorities on the application of Polkey and summarised the principles to be extracted from them, including:

> In assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal.
>
> If the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future).
>
> There will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal.
>
> However, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
>
> A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

(Software 2000 Ltd v Andrews 2007 ICR 825 EAT)

42. These principles have been consistently applied by the EAT in later cases. Of note is Elias P's observation that Tribunals must have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation even if there are limits to the extent to which it can confidently predict what might have been. In other words, it is not just the evidence adduced by the employer that will be used to determine the Polkey question.

Findings of fact

43. Taking the allegations in chronological order the first allegation relates to (what was called using shorthand in the hearing) training. That is allegation 4.2.2 and was set out as not permitting the claimant to do training in connection with Project B from the 9 February 2022 and for Project C from sometime between 5 July 2023 and 31 October 2023.

44. In his witness statement, the claimant made reference to not being permitted to do training in respect of Project D and he acknowledged that it was only

Projects B and C which were discussed at the case management hearing. He did not however apply to amend his claim to include any reference to Project D.

45. In relying upon the reference to Project D, the claimant said in evidence that this defeated the respondent's contention that this allegation was out of time.

46. There is no allegation in respect of Project D and the claimant cannot introduce an amendment via his witness statement. The case management Order of the 4 April 2025 contained (paragraph 9) a standard clause which said that if the list of issues is wrong or incomplete, the parties had 14 days to inform the Tribunal (page 41).

47. Mr Mund took the decision to terminate Project B in January 2023 and Project C on 16 January 2024. Referring to Project D (which commenced on the 28 January 2024) does not extend the time limit.

48. What the claimant said about this training (his witness statement 7.37) was:

> 'The Respondent claims training was open to all employees, but in practice, time had to be booked during sprint planning, which was far more difficult for me to secure openly. While there was an open licence to Pluralsoft training, using it required booking time away from other work. The £50 technical reference book offered to me in February 2024 was outdated, and by then I was a prolific user of ChatGPT — a far more effective, up-to-date resource.'

49. The claimant's evidence was that it was 'far more difficult' for him to secure training, not that he was unable to. The claimant does not say he asked to do training and more specifically: which training: who he asked; when he asked; and what was said in response. Furthermore, the claimant does not say how this issue was because of his age.

50. This comparator is Mr Rashid. Mr Rashid was offered a job on the 28 February 2024 and an email introducing him was sent on the 12 March 2024 (page 138).

51. In a further paragraph in section 7.37 of the witness statement, the claimant said:

> '… in my case, doing so in circumstances where my documented age had already been a factor in earlier exclusion from training and project work, where I alone was considered to "require more supervision" (GOR ¶8, p.28), and where I was also the oldest in the team.'

52. This is no more than a vague reference to age. The claimant has not suggested that specific members of staff, were given specific training on a subject matter related to either Project B or C.

53. There are other ambiguous references to exclusion from training or denial of training, but no more.

54. Mr Flowerdew's evidence was (his witness statement paragraph 3.8):

> 'I can also confirm that the Respondent* was denied the opportunity to work on projects involving more modern technologies and, by extension, the training and upskilling required to work with these technologies. The opportunities were instead given to younger employees, myself included. Specifically, the Claimant was unable to work with, and upskill on, modern front-end technologies Blazor and React, and modern backend technologies EF Core and CockroachDB. He was therefore restricted to working with VB.NET and ASP.NET WebForms, technologies that are both over 20 years old and whose commercial usage is low and declining. This likewise constitutes less favorable treatment based on age and supports the allegation of direct age discrimination.'

* It is assumed this is incorrect and he meant to refer to the claimant.

55. This is a general statement. There are no specifics. There is a reference to younger employees. There are no details of when these opportunities were given to younger staff and how they came about. There are in fact no details about the training itself. The claimant referred to it taking approximately three months and to different people taking a different amount of time to complete it. There was however no information as to the format of the training.

56. The respondent's position was there was no formal training structure. There were weekly meetings, later changed to bi-weekly meetings. On-line training was available and materials (e.g. books) could be purchased.

57. It was put to the claimant that in effect from June 2021, he had no further involvement with Project B and that there was no need for him to be involved in that project; he agreed (page 81).

58. Project C took place between April 2023 and January 2024. The claimant's own case was that the training was denied to him between 5 July 2023 and 31 October 2023. It was put to the claimant that he did not work on Project C. His response was that he was assessed as not suitable to work on Project C.

59. Chronologically, the next issue which occurred was the claimant's dismissal on the 18 March 2024, issue 2 (unfair dismissal) and 4.2.1 (direct age discrimination).

60. The unchallenged evidence was that the respondent, like many businesses, had been struggling since the global pandemic. There were redundancies in the UK and US in 2020. There were two more dismissals in January 2024 when Project C was cancelled and by then Project B had also been cancelled. Project D had commenced in January 2024 to replace Projects B and C.

61. Against that background, Mr Mund (founder and MD) unfortunately suffered significant and serious health issues. He was diagnosed with Profound Hypothyroid in July 2023. In September 2023 he had a pulmonary embolism. In October 2023 he discovered he had two cancerous tumours in his lung. On

8 March 2024, Mr Mund was told the cancer had spread to his spine and was now classified as stage 4.

62. Besides general financial problems, which resulted on two office closures and downsizing, there was an issue with payment from the respondent's largest client (client X). X had withheld payments from the respondent and it was chased for that payment in January and February 2024. X was responsible for half of the respondent's revenue.

63. Clients had reduced from 17 in January 2020 with a cash balance of £494,602, to seven clients in 2024 and a cash balance of £37,517.

64. In February 2024 the respondent learnt that X had been the victim of a serious identity fraud. A fraudster had impersonated the respondent and had intercepted $140,000 X owed to the respondent. X thought it had paid the sum to the respondent. When X realised something was wrong, it shut down communication with the respondent. This was reported to the FBI in the US. Although X led the respondent to believe that the payment would be made by the end of February 2024, it was not forthcoming. The respondent issued a 'Notice of Suspension' to X on 17 March 2024. This also resulted in a delay to the March 2024 payroll.

65. Mr Munt held a meeting on 7 March 2024 which was attended by all eight developers (page 296). The outcome of this meeting was that on the 11 March 2024, Mr Munt took the decision to cancel Project A.

66. Prior to the meeting, Mr Munt learnt that the claimant had been re-engaged on Project A, without his knowledge.

67. On the 12 March 2024, Mr Munt informed first Mr Flowerdew that his position was redundant and second the claimant of the same. Letters confirmed the redundancy and the date of termination (the 18 March 2024) (pages 139 and 140).

68. It was put to Mr Munt in cross-examination and he agreed that: there was no consultation before the communication on the 12 March 2024; that alternative employment was considered but not discussed with the claimant; there was no scoring exercise.

69. It was also put to Mr Munt that the fact the claimant did not undertake, on his case, the training; and that was detrimental to him in the redundancy process or decision. Mr Munt said that he could not recall have made any comment that the claimant was not permitted to work on Project C.

70. Mr Ludlow explored the claimant's comparator, Mr Rashid. The claimant described him as aged approximately 55. In response, the respondent said he was aged 46. In any event, the claimant compares himself to the age group of below the age of 60.

71. The claimant described Mr Rashid as ‘Senior Developer hired for substantial experience in large scale enterprise software development and impeccable educational qualifications (BSc, MSc in Computer Science) to work on Project D (page 1 of his witness statement). In addition, Mr Rashid had an MSc in Communication Engineering from Warwick. Mr Rashid was recruited to work on Project D. The claimant said he was excluded from working on Project D.

72. Based upon that, the Tribunal finds that the only two projects which were continuing in late February 2024 were Project A, which the claimant was assigned to and working on; and, Project D, which Mr Rashid was assigned to.

73. Mr Rashid was never assigned to work on Projects A, B or C. Although Project A continued for a short period of time after his appointment, he did not work on it and it was then cancelled.

74. There were material differences between Mr Rashid and the claimant.

75. Mr Flowerdew was the claimant’s line manager. Otherwise, he worked on the same projects as the claimant. He was aged 41 and he was also dismissed. Mr Flowerdew for the purposes of the claim of direct age discrimination is an evidential comparator.

76. The claimant’s age was known to the respondent as his year of birth (1957) was on his CV. He was aged 62 when he was employed. He had passed his probationary period and received pay increases.

77. The respondent relied on redundancy as a fair reason for dismissal. It is the case the respondent was aware of the issues with the claimant for some time. Indeed, Mr Munt said that in January 2024 when two members of staff were made redundant, he considered making Mr Flowerdew redundant. He still needed Mr Flowerdew for Project A, however. The respondent also needed Mr Flowerdew to manage the claimant.

78. Following the decision to cancel Project A, the Tribunal can accept that the requirement for employees to carry out work of a particular kind had ceased or diminished, or was expected to cease or diminish.

79. There was no immediate prospect of Project A being replaced and at that time, Project D was not at such a stage that the work the employees carried out was undiminished.

80. The list of issues identified the procedural steps the Tribunal would expect the respondent to undertake, when deciding the fairness or otherwise of the dismissal.

81. (2.3.1) Mr Munt agreed he had not warned or consulted the claimant.

82. (2.3.2) Although Mr Munt said all five developers were in the selection pool, in reality, the pool was only known to Mr Munt. There was no reasonable selection decision that could be objectively assessed.

83. (2.3.3) In the absence of any form of consultation, it cannot be said the respondent took reasonable steps to find the claimant suitable alternative employment. There was no discussion that led to a suggestion, for example, that the five developers may have suggested they all work 3/5th, with the result that the five of them would cover the work of three developers. That may be fanciful, however, teams do come up with creative suggestions to ensure they entire team remains; especially when the downturn in work may be temporary. The end result is that without any form of consultation, it is simply not possible to know whether there may have been creative suggestions or solutions which would have avoided the need for one of both redundancies.

84. Another example is that the Tribunal was told Mr Barker was due to retire in September 2025. Potentially, he could have agreed to retire early or to reduce his hours. Due to the lack of consultation, alternatives to dismissal were not discussed or considered.

85. The final issue to determine was the allegation of victimisation (issue 6). The protected act was (6.1.1) on 17 April 2024, via his solicitor, the claimant asserted that he was subjected to age discrimination. The detriment was (6.3.1) that on 2 May 2024, the respondent, via its solicitor, indicated that there were performance issues with the claimant and the respondent could not trust the claimant to deliver on projects.

86. The claimant's solicitor wrote to the respondent on the 17 April 2024 (page 315). The letter alleged direct age discrimination and referred to Mr Rashid as the comparator. It made other references to allegations of age discrimination, such as the clause in the contract, which was the subject of the harassment allegation (since struck out). It also referred to the claimant being excluded from key discussions and being 'barred' from participating in project work. The latter reference was under a heading of age discrimination, it did not however, set out any specifics (such as dates or more detailed allegations) or suggest a comparator. The respondent's solicitor responded on the 2 May 2024 (page 145).

87. The Tribunal finds that the claimant's solicitor's letter could fall within s.29(2)(d) EQA: making an allegation (whether or not express) that A [the respondent] or another person has contravened this Act.

88. To find an act of victimisation, the claimant then has to show he was subject to a detriment. The detriment alleged is the response to that letter of the 2 May 2024.

89. The Tribunal finds that the respondent's letter was an 'honest and reasonable' response in the circumstances. The respondent's solicitor responded to the

allegation regarding the clause in the contract, with an explanation. It referred to it being a 'hangover' from an out of date contract. It did not in fact respond to the allegation that the dismissal itself was direct age discrimination. It is conceivable, that had the letter not responded to an allegation of discrimination, that the claimant would also have complained about that. The letter did not seek to dissuade the claimant from pursing a claim; it provided an explanation to a matter which the claimant had raised.

90. Furthermore, it did so in reasonable and measured terms. It was a response to a letter before action. It did not seek to dissuade the claimant for pursing a claim. It did not threaten costs. It ended with an open offer of settlement.

91. The list of issues referred to (3.6.4) is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason (page 50)?

Conclusions

92. Training – 4.2.2. The claimant accepted that he was removed from Project B in June 2021. There was therefore no requirement for him to undertake any training in February 2022. Factually, the allegation is not made out. There were no specifics advanced by the claimant as to what training he said he missed out on, other than vague assertions.

93. The claimant did not work on Project C.

94. Mr Rashid did not start work with the respondent until March 2024.

95. Any hypothetical comparator would not be permitted to undertake training in relation to a project they were not working on.

96. There was no evidence from the claimant of any formal or structured training that was available. If other colleagues had been provided with structured training, there would have been evidence of it taking place.

97. The allegation is out of time, on the claimant's own case, by two years. The claimant did not advance any reason to seek to persuade the Tribunal to extend the time limit, other than to attempt to bring the allegation within time, by referred to Project D.

98. The reason why the claimant did not undertake the training is that he did not expressly request it and he did not work on those projects at the relevant time.

99. The allegation was no more than historical disgruntlement about something which the claimant perceived had happened, but in fact had not.

100. Dismissal on the 18 March 2024 – 2 and 4.2.1. The claimant was not dismissed because of his age. He and Mr Flowerdew (aged 41) were

dismissed, due to redundancy. The conclusion is the reason the claimant was dismissed was due to the financial situation of the respondent, Mr Munt's decision to terminate Project A, the situation with client X and his own health problems. The termination was not because of the claimant's age. There were other obvious factual reasons for his and Mr Flowerdew's employment terminating. One of those reasons was that Mr Munt felt that Mr Flowerdew was disruptive and disrespectful in the meeting on the 7 March 2024 and he felt they were both resistant to his aims moving forward. In the main, the reason the claimant was dismissed was due to the decision to terminate Project A, not his age.

101. Mr Munt needed Mr Flowerdew for Project A, which was now to be cancelled. He also needed Mr Flowerdew to manage the claimant. With the reduction in the requirements of the respondent's business for employees to carry out work of a particular kind once Project A was cancelled; Mr Munt no longer needed Mr Flowerdew or the claimant. Alongside the reduced work, Mr Munt needed to reduce costs. He needed fewer developers and so he could reduce his team.

102. Mr Munt however, accepted that there was no warning or consultation. There was no pool formally identified and there were no selection criteria to be discussed and applied. There was no consultation. The claimant and Mr Flowerdew were simply told their roles were redundant in a meeting. Although Mr Munt said he considered alternatives to redundancy, without any input from affected staff, his consideration was futile.

103. The conclusion is that the dismissal was unfair due to the lack of process and procedure. It is accepted there were significant issues for the respondent to address, however none of them were so exceptional to remove the need for consultation.

104. The respondent was already in financial difficulties, not withstanding the fraud. Mr Munt's health was already compromised, not withstanding (and certainly not undermining) the diagnosis on the 8 March 2024. There was an ongoing concern that X would leave the respondent. None of these crises were so immediate that they removed the need for consultation.

105. Although it is accepted the requirement for employees to do work of a particular kind had diminished and the dismissal was attributable to this state of affairs, the respondent acted unreasonably in the circumstances in not consulting with the claimant. The respondent's size (a small employer) and lack of administrative resources (no HR department and under financial pressure) having been considered, and in determining in accordance with equity and the substantial merits of the case; results in the dismissal being unfair.

106. In a small employer and with a small team, the period of consultation need not have been particularly long. Once redundancies were proposed (rather than acted upon) all the affected staff should have had time to process that fact and to consider it. In the meantime, Mr Munt could have been deciding selection criteria and the methodology he would used to apply the criteria (even if it were a case of deciding five or so categories and then a scoring method of 0-5 or 0-10). He could then have shared the selection criteria and thereafter applied it. He could then have consulted upon the outcome, before confirming the staff selected for redundancy.

107. The Tribunal's conclusion is that this process would have taken four weeks. The Tribunal also concluded, based upon the concerns about the claimant's performance the fact that he needed to be line managed, unlike the other developers and the fact he had worked on projects without Mr Munt's knowledge, would have result in his role being made redundant at the conclusion of the consultation process.

108. Victimisation – 6. In closing submissions, the respondent accept that the claimant's solicitor's letter of 17 April 2024 was a protected act. It took issue that the reply of the 2 May 2024 was not detrimental. Responding to an allegation and setting out honestly and reasonably the respondent's position, is not a detriment. There was nothing oppressive or threatening about the response. The response was simply the respondent protecting itself in the litigation.

Remedy

109. As the finding is that the dismissal was unfair, issue 3.6.4 is relevant. Is there a chance the claimant would have been fairly dismissed anyway if a fair procedure had been followed?

110. The Tribunal had found that a fair dismissal would have taken place within four weeks and the claimant's employment would have been fairly terminated.

111. The claimant has received a redundancy payment and that therefore extinguished the basic award.

112. The compensatory award is four weeks' net pay. The claimant's net monthly pay was £3,644.93 (page 6). The net sum of £3,644.93 x 12 divided by 52 x 4 = £3,364.55. That sum is due to be paid by the respondent to the claimant.

Approved by:

Employment Judge Wright

30 September 2025

Judgment sent to the parties on:

20 October 2025

For the Tribunal:

P Wing

P Wing

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision. If written reasons are provided they will be placed online.

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at https://www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found at www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/